

FEDERAL COURT OF AUSTRALIA

Hassan v Minister for Immigration and Multicultural and Indigenous Affairs

[2006] FCA 379

MIGRATION – spouse visa – failure to comply with mandatory criteria

Migration Regulations 1994 (Cth), Regulation 801.221

Minister for Immigration; ex parte Miah (2001) 206 CLR 57 referred to

Nais v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 77 referred to

Blencoe v British Columbia (Human Rights Commission) [2000] 2 SCR 307 referred to

**MOHAMMAD KAMRUL HASSAN v THE MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS
VID 1435 OF 2005**

**KENNY J
9 MARCH 2006
MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

VID 1435 OF 2005

**BETWEEN: MOHAMMAD KAMRUL HASSAN
 APPLICANT**

**AND: THE MINISTER FOR IMMIGRATION AND
 MULTICULTURAL AND INDIGENOUS AFFAIRS
 FIRST RESPONDENT**

**MIGRATION REVIEW TRIBUNAL
SECOND RESPONDENT**

JUDGE: KENNY J

DATE OF ORDER: 9 MARCH 2006

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs fixed in the sum of \$2,000.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGE: KENNY J

DATE: 9 MARCH 2006

PLACE: MELBOURNE

EX TEMPORE REASONS FOR JUDGMENT DELIVERED ON 9 MARCH 2006

- 1 The appellant, a citizen of Bangladesh, entered Australia on 29 October 1999 via a subclass 560 student visa. On 12 July 2001, the appellant married an Australian citizen, Karishma Kumari. On 1 August 2001, he applied for a spouse visa (a subclass 820 temporary visa leading to a subclass 801 permanent visa) and Ms Kumari lodged a nomination in support of the application.
- 2 The Department of Immigration and Multicultural and Indigenous Affairs (“the Department”) granted the temporary visa on 13 November 2001. On that day, an officer of the Department found that Mr Hassan and Ms Kumari were living in a genuine and continuing relationship. Mr Hassan was advised that after two years the Department would contact him and might require more evidence that his relationship was then continuing.
- 3 On 27 September 2003, evidence was forwarded to the Department in the form of declarations from Mr Hassan and Ms Kumari stating that their relationship was continuing. Other documents were also sent as supporting evidence such as utility bills, tax assessments, bank statements and Medicare letters.

4 By 14 April 2004, the Department had not contacted the appellant and no decision had been made regarding the permanent spouse visa. On that day, Ms Kumari contacted the Department and stated that she wished to withdraw her sponsorship. After receiving the withdrawal of sponsorship from Ms Kumari, a delegate of the Minister invited Mr Hassan to comment on the information received, and to put forward any evidence that might suggest that there were any exceptional circumstances. Mr Hassan did not reply. On 19 October 2004 a delegate of the Minister refused to grant Mr Hassan a permanent visa.

5 On 3 November 2005, the appellant applied to the Migration Review Tribunal (“the Tribunal”) for review of the delegate’s decision. At the 5 May 2005 hearing, the appellant confirmed that his relationship with Ms Kumari had ceased. In a decision dated 10 June 2005, the Tribunal affirmed the delegate’s decision, finding that the appellant was not entitled to a spousal visa.

6 Pursuant to s 483 of the *Migration Act 1958* (Cth) (“the Act”), the appellant applied to the Federal Magistrates Court for review of the Tribunal’s decision. The appellant did not provide any particularised claims of error or written submissions. At the hearing of 25 October 2005, the appellant noted that, although he and his former wife were separated by the time of delegate’s decision, his marriage lasted longer than the two years required for a permanent visa. The learned Federal Magistrate held that there is no point of time at which a decision is required to be made after the relevant two years have elapsed. Therefore, his Honour reasoned that, as Mr Hassan was not married at the time of decision, he was not entitled to a visa. The appellant now appeals from that decision.

7 The appellant has raised the following two grounds of appeal:

“Constructive failure of jurisdiction going to satisfaction: misconception of duty by the delegate. The delegate failed to consider that the applicant will face difficulties to stay in Australia without his spouse visa.”

“Constructive failure of jurisdiction going to satisfaction: procedural unfairness by the tribunal and thereby decision fall under jurisdictional error. The applicant explained his situation and limitation to continue the relationship with his partner but the Tribunal failed to consider that issue.”

8 The appellant has not provided any particulars of these grounds and did not file any written submissions. At the hearing he emphasized that he was not responsible for the breakdown of his marriage; that he had not sought to end his relationship with his wife; that his parents

were incapacitated and had sacrificed a great deal to enable him to study in Australia, with a view to making a decent life for himself and his family here; and that his studies and work had been seriously affected by the breakdown of his marriage and subsequent legal proceedings. The applicant made his case with dignity and sincerity.

9 The first ground challenges the primary decision which is not the subject of the current appeal. Moreover, the appellant has provided no reason to conclude that the delegate should have considered his difficulties in staying in Australia without a spouse visa.

10 The second ground appears to challenge the Tribunal's failure to consider the reasons behind the appellant's separation from his spouse. The appellant has not shown how this is a relevant consideration under the regulations. Regulation 801.221 of the *Migration Regulations 1994* (Cth) ("the Regulations") outlines the criteria to be met for a permanent spouse visa at the time of decision. Under this regulation, the circumstances behind a separation are only relevant if they involve domestic violence: see reg 801.221(6). There is no suggestion that there was domestic violence in this case. Rather, the appellant simply notes that he was not responsible for his separation from his wife. That, however, was not a relevant consideration for the Tribunal.

11 Before the Federal Magistrate and again today the appellant suggested that he should have received a permanent visa because he remained married for more than two years after he applied for the visa. The regulations provide as follows (emphasis added):

*"801.22 Criteria to be satisfied **at the time of the decision***

801.221

(1) The applicant meets the requirements of subclause (2), (2A), (3), (4), (5), (6) or (8).

(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the holder of a Subclass 820 visa; and

(b) the applicant continues to be sponsored for the grant of the Subclass 820 (Spouse) visa by:

(i) the sponsoring spouse; or

(ii) the Australian citizen, Australian permanent resident or eligible New Zealand citizen who sponsored the applicant for that visa; and

- (c) *the applicant is the spouse of the sponsoring spouse; and*
- (d) *subject to subclauses (6A) and (7), at least 2 years have passed since the application was made.*”

12 The delegate’s decision was made on 19 October 2004. Under regulation 801.22, the criteria in reg 801.221 must be “satisfied at the time of the decision”. It is uncontested that Mr Hassan was separated from his wife at that time and therefore did not satisfy the criteria of 801.221. Therefore, the only question is whether the decision was properly made on 19 October 2004 or should have been made earlier.

13 The delegate was not required to make the decision sooner. Any delay was consistent with the Act and the Regulations and did not deny procedural fairness. The Regulations do not require that the delegate’s decision be made immediately after two years have passed since the original application. Moreover, s 63(1) of the Act states:

“(1) *Subject to sections 39 (criterion limiting number of visas), 57 (give applicant information), 84 (no further processing), 86 (effect of limit on visas) and 94 (put aside under points system) and subsections (2) and (3) of this section, **the Minister may grant or refuse to grant a visa at any time after the application has been made.***” (Emphasis added)

14 There was no violation of the Act.

15 In *Minister for Immigration; ex parte Miah* (2001) 206 CLR 57 the High Court held, when dealing with ss 52 to 63 of the Act, that there was no intention to exclude the operation of common law rules of procedural fairness. In *Nais v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77 (“*Nais*”), Gleeson CJ referred to Bastarache J whom, for the majority in *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307 at 367 [102], said that it was “accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied”. There was, however, no infringement of this principle in this case.

16 Much of the delay in this case can be attributed to the Department’s efforts to allow Mr Hassan an opportunity to respond to Ms Kurami’s letter of 14 April 2004. Also, the delay must be considered within the context of an application for a spousal visa. Marriage is intended to be a life-long commitment. Thus, a delay of a few months should not prejudice

an applicant for a spouse visa. The delay in this case was significantly less than that considered in *Nais* (4½ years) where the High Court did find a breach of procedural fairness. In all the circumstances, I do not find that the delay in this case involved a denial of procedural fairness.

- 17 As the appellant has identified no error in the decisions of the Tribunal or the Federal Magistrate, I would dismiss the appeal with costs.
- 18 It is open to the appellant to make application to the Minister pursuant to s 351 of the Act, which enables the Minister to make a more favourable decision notwithstanding the decision of the Tribunal. There would be no impediment to him so doing. His would appear to be an appropriate case for making such an application.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated: 6 April 2006

Applicant appeared in person

Counsel for the Respondent: Mr C Symons

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 9 March 2006

Date of Judgment: 9 March 2006